SUPREME COURT, U.S. 73-134

FILED
SEP 21 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. A-1150

CLEVE COLE, Alias,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE STATE OF TENNESSEE COURT OF CRIMINAL APPEALS

ALEX B. SHIPLEY, JR.
Assistant Attorney General
State of Tennessee
420 Supreme Court Building
Nashville, Tennessee 37219

TENNESSEE LAW PRINTERS, P. O. Box 277, Knoxville, Tennessee, Phone 525-4202
9-18-73-49

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
QUESTIONS FOR REVIEW	2
ARGUMENT	3
CONCLUSION	5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. A-1150

CLEVE COLE, Alias,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE STATE OF TENNESSEE COURT OF CRIMINAL APPEALS

MAY IT PLEASE THE COURT:

The respondent, State of Tennessee, in opposition to the petition for writ of certiorari would respectfully suggest to the Court that certiorari should be denied.

OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Tennessee affirming the judgment of conviction in the trial court

was filed on 3 January 1973. On 20 February 1973 the Supreme Court of Tennessee denied the petitioner's request for certiorari without opinion. The pertinent opinion is appended to the petition.

JURISDICTION

Respondent adopts petitioner's jurisdictional statement.

STATEMENT OF THE CASE

Petitioner was convicted of the offense of selling a controlled substance in violation of the Tennessee Drug Control Act of 1971, Tennessee Code Annotated § 52-1408 et seq. on 18 April 1972. The Court of Criminal Appeals of Tennessee affirmed the trial court's conviction on 3 January 1973. The Supreme Court of Tennessee rejected his petition for certiorari by an order dated 20 February 1973. Petitioner now seeks a writ of certiorari to the Court of Criminal Appeals of Tennessee.

QUESTIONS FOR REVIEW

The questions for review are restated as follows:

1. Whether the defense of entrapment as defined under Tennessee law is a violation of the defendant's Fourteenth Amendment Constitutional right to Due Process.

2. Whether the decision in *Brooks v. Tennessee*, 406 U.S. 605 (1972), must be retroactively applied.

3. Whether the failure of the petitioner's privately retained counsel to raise the above issues resulted in a denial of effective assistance of counsel.

ARGUMENT

I.

THE LAW OF ENTRAPMENT IN TENNESSEE DENIED NO CONSTITUTIONAL RIGHT OF THE PETITIONER.

It is submitted that the appellate courts in this state have often held that entrapment is not available as a defense in Tennessee. See *Thomas v. State*, 187 S.W.2d 529, 182 Tenn. 380 (1945); *Palmer v. State*, 216 S.W.2d 25, 187 Tenn. 527 (1949); *Goins v. State*, 237 S.W.2d 8, 192 Tenn. 32 (1951); *Hagamaker v. State*, 347 S.W.2d 488, 208 Tenn. 565 (1961); *Rhoden v. State*, 352 S.W.2d 227, 209 Tenn. 202 (1962); *Warden v. State*, 381 S.W.2d 247, 214 Tenn. 398 (1964); *Williams v. State*, 403 S.W. 2d 319, 218 Tenn. 359 (1966); *Shadden v. State*, 488 S.W. 2d 54, ... Tenn.Crim.App. ... (1972). *Halquist v. State*, 489 S.W.2d 88, ... Tenn.Crim.App. ... (1972). However, it has been said that the doctrine of entrapment is recognized to the extent that it may be a valid defense where the method employed in attempting to discover an offender eliminates from the prosecution case one of the essential elements of the crime sought to be discovered. *Williams v. State*, *supra*. Thus, in *Hagamaker v. State*, *supra*, where the occupants of a building lured potential burglars into entering the building in order to commit larceny and permitted the entry, the Supreme Court reversed a burglary conviction since an essential element of the burglary, to wit: trespass, was absent. In *Williams*, *supra*, it was noticed that one of the necessary elements of an offense is intent. In *Halquist v. State*, *supra*, the Court of Criminal Appeals, although giving lip service to the dictum that entrapment is not recognized as a defense, the Court quoted with favor the following definition from Corpus Juris Secondum:

"Entrapment occurs when '. . . officers of the law or their agents incited, induced, instigated, or lured accused into committing an offense which he otherwise would not have committed and he had no intention of committing. Stated otherwise, entrapment is the conception and planning of an offense by an officer and the procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer. Entrapment occurs only when the criminal conduct is the product of the "creative activity" of enforcement officials, that is, only where the criminal design originates in the mind of the police officer and with the accused . . .' 22 C.J.S. Criminal Law § 45 (2, pp. 138-139)." At p. 94.

The defendant has failed to demonstrate any denial of Due Process or the denial of any right which has denied him a fair trial. *In re Oliver*, 333 U.S. 257 (1948); *Morrisey v. Brewer*, 408 U.S. 471 (1972); *Jenkins v. McKeithin*, 395 U.S. 411 (1969); *Specht v. Patterson*, 386 U.S. 605 (1967). Furthermore, it is submitted that 28 U.S.C. § 1257 precludes this Honorable Court from considering the petitioner's contention since he failed to present this contention to the highest State authority. *Cardinale v. Louisiana*, 394 U.S. 437 (1969); *Street v. New York*, 394 U.S. 576 (1969). It is noted that in each of the State cases heretofore discussed, the question of entrapment had been raised at the trial and presented at the appellate levels.

II.

THE DECISION IN *BROOKS V. TENNESSEE, SUPRA*, SHOULD NOT BE APPLIED RETROACTIVELY.

Respondent adopts the determination of the United States Court of Appeals for the Sixth Circuit in the case of *United*

States v. Black, unpublished, No. 72-1906, decided and filed June 15, 1973, in support of the proposition that the decision in *Brooks* should not receive retroactive application. The Court there held:

> "We reemphasize that the purpose of *Brooks* was not the enhancement of the fact-finding process. There was a continued justified reliance on the pre-*Brooks* law in two of the four states in this circuit. The effect of a retroactive application of *Brooks* would be major. We hold that *Brooks* is not to be applied retrospectively to trials conducted before its date of decision. We note that 'we do not disparage a constitutional guarantee in any manner by declining to apply it retroactively.' *Johnson*, *supra*, 384 U.S. at 728." Slip Opinion p. 13.

III.

SINCE THE ISSUES PRESENTED ABOVE MUST BE DETERMINED AGAINST THE PETITIONER, THE QUESTION PRESENTED CONCERNING INCOMPETENT COUNSEL IS FRIVOLOUS.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

ALEX B. SHIPLEY, JR.
Assistant Attorney General
State of Tennessee
420 Supreme Court Building
Nashville, Tennessee 37219
Telephone: (615) 741-2865

DAVID M. PACK
ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the State of Tennessee Court of Criminal Appeals has been forwarded by U. S. Mail this 4th day of September, 1973 to Mr. Cleve Cole, 830 Anderson Ave., Knoxville, Tenn. 37921.

ALEX B. SHIPLEY, JR.
Assistant Attorney General